MOTION FILED

DEC 3 - 2007

(2)

No. 07-585

In The
Supreme Court of the United States

PETRA PRESBYTERIAN CHURCH,

Petitioner,

v.

VILLAGE OF NORTHBROOK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KEVIN T. SNIDER,
CA Bar No. 170988*
**Counsel of Record*
MATTHEW B. MCREYNOLDS,
CA Bar No. 234797
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION TO FILE *AMICUS CURIAE* BRIEF

To the Honorable Chief Justice of this Court:

Pacific Justice Institute (PJI) requests leave to file an amicus brief in support of Petitioner, Petra Presbyterian Church. PJI has obtained the written consent of counsel for Petra Presbyterian Church. Counsel for the Village of Northbrook has been notified of PJI's intention to file this amicus brief, but the Village did not consent.

Pursuant to Rule 37.2(b), PJI moves for leave to file a brief in support of Petitioner on the grounds that there are pertinent points of law which have not been brought to the Court's attention by the parties. So as not to burden the Court, the arguments in this brief are succinct and are set out so that they will serve to assist this Court.

Dated: December 3, 2007

KEVIN T. SNIDER,
CA Bar No. 170988*
**Counsel of Record*
MATTHEW B. MCREYNOLDS,
CA Bar No. 234797
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

MOTION TO FILE *AMICUS CURIAE* BRIEF 1

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CIRCUITS ARE SPLIT AS TO WHAT CONSTITUTES A SUFFICIENT SHOWING OF "SUBSTANTIAL BURDEN" 2

A. The Second, Seventh, And Tenth Circuits Interpret "Substantial Burden" In A Constrictive Manner 3

B. "Substantial Burden" Under RLUIPA Is Interpreted Liberally In The Fifth, Sixth, Ninth, And Eleventh Circuits..... 7

i. The Ninth, and Eleventh Circuits have explicitly rejected the *CLUB* approach 7

ii. The Fifth Circuit has adopted a more liberal construction of "substantial burden" 8

C. The Supreme Courts Of Oregon And Washington Have Adopted Liberal Constructions Of "Substantial Burden" 10

TABLE OF CONTENTS – Continued

Page

II. A LIBERAL INTERPRETATION OF "SUBSTANTIAL BURDEN" IS CONSISTENT WITH LEGISLATIVE INTENT 11

A. The Clear Language Of RLUIPA Mandates A Broad And Liberal Construction Of "Substantial Burden" 11

B. The "Effectively Impracticable" Standard Of *CLUB* Is Inconsistent With The "Substantial Burden" Jurisprudence Of This Court 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004) 8, 9

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 11, 12

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).... 3, 4, 7, 8, 12

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123 (Ore. 2005) 10

First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992)..... 10

Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006)..... 8, 10, 11

Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983)..... 5

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507 (D. N.J. 2005)..... 6

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988)..... 4

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004)..... 8, 10, 13

Rector, Wardens & Members of Vestry v. City of New York, 914 F.2d 348 (2nd Cir. 1990)..... 5

TABLE OF AUTHORITIES – Continued

Page

Sherbert v. Verner, 374 U.S. 398 (1963) 12, 13

Spratt v. Rhode Island Dept. of Corrections, 482 F.3d 33 (1st Cir. 2007) 6

Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) 12, 13, 14

Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003) 5

Vision Church, United Methodist v. Village of Long Grove, 397 F. Supp. 2d 917 (N.D. Ill. 2005) 6

Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) 6

STATUTES

42 U.S.C.A. § 2000cc et seq. (RLUIPA) ..... *passim*

RULES

Sup. Ct. R. 10 3

INTEREST OF *AMICUS CURIAE*[1]

Pacific Justice Institute ("PJI") is a nonprofit corporation, operating under 501(c)(3) of the Internal Revenue Code, which engages, in part, in litigation affecting the public interest as it relates to the defense of speech, association, religious exercise, and the establishment clause. As such, PJI routinely represents religious organizations in both administrative proceedings and litigation when rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) are implicated. The case before the Court will have a profound impact on those whom PJI represents as well as this organization's ability to provide legal assistance. Thus, PJI has a strong interest in the outcome of this matter.

SUMMARY OF THE ARGUMENT

Circuit Courts and several state courts of last resort are split over what constitutes a "substantial burden" under RLUIPA. In one camp, the Second, Seventh, and Tenth Circuits have adopted a very

[1] Pursuant to revised Sup. Ct. R. 37 et seq., counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

strict interpretation of "substantial burden" requiring a plaintiff to show that a regulation has made her exercise of religion "effectively impracticable." In an opposing camp, the Fifth, Sixth, Ninth, and Eleventh Circuits, in addition to the supreme courts of Washington and Oregon have adopted a liberal interpretation of "substantial burden." In light of these inter-circuit and state court conflicts, the *amicus* urges this Court to grant the petitioner's writ of certiorari to resolve this split in authority.

Moreover, in light of the plain language of RLUIPA mandating a broad construction of the statute in favor of religious freedom, and the previous jurisprudence of this court in Free Exercise cases, PJI argues that the liberal construction of "substantial burden" is consistent with legislative intent.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CIRCUITS ARE SPLIT AS TO WHAT CONSTITUTES A SUFFICIENT SHOWING OF "SUBSTANTIAL BURDEN."

The Supreme Court should grant the petitioner's writ of certiorari to resolve the conflict between the Circuits regarding the interpretation of "substantial burden." The Court of Appeals of the Second, Seventh and Tenth Circuits have "entered decision[s] in conflict with the decision[s] of" the Fifth, Sixth, Ninth,

and Eleventh Circuits "on the same important matter"; namely the requirements for a showing of "substantial burden" in Religious Land Use cases which involves an increasingly important segment of Free Exercise jurisprudence of the Court. Sup. Ct. R. 10. Moreover, the Fifth, Sixth, Ninth, and Eleventh Circuits have decided this important federal question "in a way that conflicts with decisions by" the Supreme Courts of Oregon and Washington. *Id.* In light of these splits between Circuit courts and state courts of last resort, the Supreme Court should grant the petitioner's writ of certiorari to resolve these conflicts.

A. The Second, Seventh, And Tenth Circuits Interpret "Substantial Burden" In A Constrictive Manner.

The Second, Seventh, and the Tenth Circuits have interpreted "substantial burden" to impose a significantly heavy burden on religious assemblies.

The Seventh Circuit held that in RLUIPA cases, in order to establish a *prima facie* case, a plaintiff must show a "substantial burden" by proving that the land use regulation "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise *effectively impracticable*." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*") (emphasis added). The Seventh Circuit reasoned that,

> Application of the substantial burden provision to a regulation inhibiting or constraining

> *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use – however minor the burden it were to impose – could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.

Id.

Therefore, under the Seventh Circuit standard, "the use of property for religious purposes" is presumptively not an important enough exercise of religion to trigger a "substantial burden" on religion. The religious assembly can only rebut this presumption by making the extremely difficult showing that the regulation necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise *effectively impracticable. Id.*

Similarly the Tenth Circuit, in *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 824-25 (10th Cir. 1988), held that a zoning regulation forbidding a congregation from building a house of worship did not place a substantial burden on the church because regulation of the location of church construction was not an impediment to religious observance in the sense of a prohibition. The court held that financial burdens do not rise to the level of infringement of religious freedom. *Id.*

In another pre-RLUIPA religious land use case, the Sixth Circuit observed that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of [a congregation's] religious beliefs." *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983). In *Lakewood* the defendant city's zoning plan barred construction of the church on a lot the congregation owned. Under the city's plan, only ten percent of the city's property was land on which a church could be built. Nevertheless, because the effect of the Lakewood ordinance did not completely prohibit the congregation or any other faith from worshiping in the city, the court affirmed the judgment of the district court, stating that "[i]nconvenient economic burdens do not rise to a constitutionally impermissible infringement of free exercise." *Id.* at 306.

Similarly, in *Rector, Wardens & Members of Vestry v. City of New York*, 914 F.2d 348, 355 (2nd Cir. 1990), the court held that "no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." Some other circuits and district courts have followed the lead of the Second, Seventh, and the Tenth Circuits by imposing a strict interpretation of "substantial burden" in RLUIPA cases. *See, Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (holding that church congregation's right to free exercise of religion was not substantially burdened by

zoning ordinance prohibiting religious institutions from conducting worship services within district, and therefore ordinance did not violate Religious Land Use and Institutionalized Persons Act); *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507 (D. N.J. 2005) (requirement that church locate in other available areas of city and not in redevelopment zone did not impose substantial burden on religion); *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (holding that city denial of conditional use permit to operate church at proposed location based on parking and pedestrian access problems did not "substantially burden" religious exercise); *Vision Church, United Methodist v. Village of Long Grove*, 397 F. Supp. 2d 917 (N.D. Ill. 2005) (holding that denial of special permit to build church did not impose substantial burden on religion, since size of existing building seemed reasonable); *Spratt v. Rhode Island Dept. Of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007) (assuming, without holding, that a "substantial burden" is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs").

These strict constructions of "substantial burden" under RLUIPA conflict, not only with the language of RLUIPA itself, but also with the more liberal interpretation of "substantial burden" adopted by the Ninth, Fifth, and Eleventh Circuits.

B. "Substantial Burden" Under RLUIPA Is Interpreted Liberally In The Fifth, Sixth, Ninth, And Eleventh Circuits.

The strict interpretation of "substantial burden" in the Second, Seventh, and Tenth Circuits conflicts with the more liberal construction of "substantial burden" adopted by the Fifth, Sixth, Ninth, and Eleventh Circuits. In fact, the Fifth, Ninth, and Eleventh Circuits have explicitly rejected the strict standard of "substantial burden" adopted by the Seventh Circuit. The Sixth Circuit also has adopted a much more liberal interpretation of "substantial burden" under RLUIPA.

i. The Ninth, and Eleventh Circuits have explicitly rejected the *CLUB* approach.

The Ninth and Eleventh Circuits have explicitly repudiated and criticized the Seventh Circuit's "effectively impracticable" definition of "substantial burden." To prevent a burdensome repetition of these circuits' positions, *amicus* refers the Court to Petitioner's Petition For Writ of Certiorari at 19-21. In addition, the Fifth Circuit, after discussing the different standards for "substantial burden" in Religious Land Use cases, has refused to adopt the "effectively impracticable" test of the Seventh Circuit and has instead adopted a more liberal approach.

ii. The Fifth Circuit has adopted a more liberal construction of "substantial burden."

In a very informative decision in *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004), the Fifth Circuit first took note of the split between the circuits as to the exact meaning of "substantial burden" by pointing to the fact that "the RLUIPA does not contain a definition of 'substantial burden,' and the courts that have assayed it are not in agreement." *Id.* at 568. The *Adkins* court went on to explain the differences between the Seventh Circuit "effectively impracticable" approach and the Ninth Circuit and Eleventh approaches by showing the difference between the tests explained in *CLUB*; *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004); and *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 456 F.3d 978 (9th Cir. 2006). The Fifth Circuit did not adopt any of the above approaches and instead adopted an approach that most resembles a mixture of the Ninth Circuit and Eleventh Circuit approaches. *Adkins,* 393 F.3d at 569-570. The Fifth Circuit explained "substantial burden" as follows,

> For purposes of applying the RLUIPA in this circuit, a government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when

> it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Id.

The *Adkins* Court rejected the Eighth Circuit requirement that a burdensome practice must effect a "central tenet" or fundamental aspect of the religious belief by emphasizing that "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." *Id.* Further, the Fifth Circuit also refused to adopt the "effectively impracticable" standard of the Seventh Circuit and instead requires only a showing that the challenged regulation "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."

Therefore, the definition of "substantial burden" in the Second, Seventh, and Tenth Circuits conflicts with the definition of "substantial burden" adopted by

the Fifth, Ninth, and Eleventh Circuits. But the split as to the definition of "substantial burden" does not end there. The conflict over the meaning of "substantial burden" has also reached several state courts of last resort.

C. The Supreme Courts Of Oregon And Washington Have Adopted Liberal Constructions Of "Substantial Burden."

The Supreme Courts of Oregon and Washington have also refused to follow the "effectively impracticable" approach of the Seventh Circuit and have adopted a more liberal construction of "substantial burden" similar to that of the Eleventh Circuit in *Midrash*.

In *First Covenant Church v. City of Seattle*, 840 P.2d 174, 184 (Wash. 1992), the Supreme Court of Washington, following this Court's jurisprudence in religious taxation cases, stated that "a financial burden on religious activity, if too gross, may unconstitutionally infringe on free exercise." This formulation of the rule is in direct conflict with the "effectively impracticable" requirement in the Seventh Circuit. *See* Petitioner's Petition for Writ of Certiorari at 21.

Moreover, in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005), the Supreme Court of Oregon adopted a definition of "substantial burden" that closely resembles the definition of Eleventh and Ninth Circuits in *Midrash*, and *Guru*

Nanak, holding that "a government regulation imposes a substantial burden on religious exercise only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." Thus, in Oregon, a religious assembly need not show that the challenged regulation made it's practice of religion "effectively impracticable." Instead, there is a lesser showing that the regulation "pressured" the religious assembly to make a choice between following religious percepts and forfeiting *benefits. Id.*

II. A LIBERAL INTERPRETATION OF "SUBSTANTIAL BURDEN" IS CONSISTENT WITH LEGISLATIVE INTENT.

A. The Clear Language Of RLUIPA Mandates A Broad And Liberal Construction Of "Substantial Burden."

The language of the statute states that "this chapter [RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C.A. §§ 2000cc-3(g). As Justice Powell articulated the legal maxim, the plain meaning of the words of the statute are always the starting point in statutory construction. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). Thus, according to the language on the face of the statute, the courts should construct the words of the statute, including

"substantial burden," liberally and "in favor of a broad protection of religious exercise." *Id.*

The "effectively impracticable" standard imposed on religious assemblies in the Seventh Circuit cannot be reconciled with the legislative intent to provide "broad protection" to religious exercise to the "maximum extent permitted by the terms of . . . [RLUIPA] and the Constitution." In sum, the question that courts should ask when interpreting substantial burden is: What is the maximum extent to which a local government can accommodate the free exercise of religion? Therefore, the constrictive interpretations by some of the circuits is inconsistent with the intent of Congress when it provided for "broad protection" of religious exercise.

B. The "Effectively Impracticable" Standard Of *CLUB* Is Inconsistent With The "Substantial Burden" Jurisprudence Of This Court.

The previous jurisprudence of this Court, as evidenced from the decisions in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Thomas v. Review Bd. of the Ind. Employment Sec. Div.,* 450 U.S. 707 (1981), mandates a liberal interpretation of "substantial burden" in RLUIPA cases.

This Court has held that unemployment compensation regulations may impose a "substantial burden" on a beneficiary's free exercise if the regulations pressure the beneficiary to modify her religious

beliefs in order to receive unemployment benefits. *Sherbert,* 374 U.S. 398; *Thomas*, 450 U.S. 707. Thus, in *Sherbert*, this Court held that where a Seventh Day Adventist terminated her employment because she refused to work on Saturdays due to her religious beliefs, the unemployment compensation benefits that denied her compensation "substantially burdened" her free exercise of religion. *Sherbert*, 374 U.S. at 406.

In a similar ruling in *Thomas*, this Court held that a choice between unemployment benefits or religious duties imposed a "substantial burden" because it exerted "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas,* 450 U.S. at 717-18. These cases demonstrate "that a 'substantial burden' must place more than an inconvenience on religious exercise." *Midrash Sephardi,* 366 F.3d at 1227.

In neither *Sherbert* nor *Thomas* was the plaintiff required to show that the unemployment benefit regulations made the exercise of her religion "effectively impracticable." Indeed, it is doubtful that either plaintiff could have made such a showing, since both plaintiffs were free to exercise their religion with minor modifications or compromises or forgo their unemployment benefits. Therefore, the regulations in *Sherbert* and *Thomas* did not make the practice of religion, "effectively impracticable" for the plaintiffs. Nonetheless, this Court found that the regulations in those cases did in fact impose a substantial burden on plaintiffs because these regulations

exerted a "substantial pressure on an adherent to modify his behavior." *Thomas,* 450 U.S. at 717-18.

Since the "effectively impracticable" approach adopted by the Seventh Circuit is inconsistent with the previous jurisprudence of this court in Free Exercise cases, the Fifth, Ninth, and Eleventh Circuits have refused to adopt a strict interpretation of "substantial burden," and have instead interpreted "substantial burden" more liberally.

In light of the plain language of RLUIPA in favor of a broad construction and the previous jurisprudence of this court in Free Exercise cases, the *amicus* respectfully urges the Court to adopt a liberal interpretation of "substantial burden" as explained by the Ninth Circuit.

CONCLUSION

In view of the inter-circuit conflict between the Circuit Courts and the split of authority between the Circuits and the state courts of last resort regarding the meaning of RLUIPA's "substantial burden," the petitioner for certiorari should be granted. Indeed, a primary function of this Court is to provide clarity in interpretation of the laws of the land. Both religious assemblies and local governments are in need of a clear standard relative to RLUIPA. Such a uniform understanding of the law will serve to reduce litigation in this area. It is in the public interest to avoid litigation due to the law's uncertainty in this area in

that said lawsuits deplete the coffers of both local government as well as religious nonprofits.

Dated: December 3, 2007

Respectfully submitted,

By: PACIFIC JUSTICE INSTITUTE

KEVIN T. SNIDER,
CA Bar No. 170988*
*Counsel of Record for
Amicus Curiae
MATTHEW B. MCREYNOLDS,
CA Bar No. 234797
Post Office Box 276600 (mail)
9851 Horn Road, Suite 115
(deliveries only)
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amicus Curiae